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No. 00-1227

In The

Supreme Court of the United States

GREENSPRING RACQUET CLUB, INC.; WILLIAM HIRSHFELD; and LORETTA HIRSHFELD,

Petitioners,

v.

BALTIMORE COUNTY, MARYLAND, a body corporate and Politic,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S PERCEIVED MISSTATEMENT OF FACTS MADE IN THE PETITION

Rule 15.2 admonishes counsel opposing a Petition for Writ of Certiorari to "point out in the brief in opposition, and not later, any perceived misstatement made in the petition." The ten misstatements enumerated by Respondents (Opposition, pp. 2-5) are total misapprehensions and have not properly been drawn from the pleadings.

Respondents claim Petitioners' statement that their redevelopment efforts have lasted for several years is "quite false." (Opposition, p. 2). According to Respondents, Petitioners' redevelopment efforts began June 10, 1998 and ceased on October 5, 1998 with the retaliatory passage of Bill 111-98 ("the Ordinance"). (Opposition, p. 2). Respondents omit the multiple requests for relief after Bill 111-98 was adopted: (1) Petitioners' request for an intermediate category of rezoning to avoid the restrictions of the Ordinance (*MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986) (need to apply for intermediate relief); (2) a second application for the ministerial right to proceed to a building permit; (3) Petitioners' request for a "footprint exemption" under the terms of the Ordinance (*Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172, 188 (1985) (application for a "variance"); and (4) the present litigation. (App. 6). These multiple efforts to redevelop the subject property have clearly extended beyond October 1998 and continue to the present day which, as stated by Petitioners, is several years after their efforts began in June 1998. As emphatically pointed out by Justice Scalia stated in *City of Monterey v. Del Monte Dunes* at oral argument, five times is enough. Tr. of Oral Argument, p. 3.

Respondents also attempt to reestablish the record of the case. According to Respondents, "the record reflects that [Bill 111-98] applies to over 150 other properties." (Opposition, p. 3). In support of this proposition Respondents cite to the Memorandum Opinion of the District Court. The actual text of the opinion indicates that Respondents' contention is patently erroneous.

> Greenspring claims these restrictions cover only its site and one other. The County asserts that the Ordinance affects 150 sites. For the purposes of the motion [to dismiss], I assume that Greenspring's allegations are true."

(App. 30, n.3). Therefore, for purposes of this case, the Ordinance applies to Petitioners' property and one other property not 150 sites as claimed by Respondents.

Petitioners need not go any further in distinguishing the enumerated misstatements Respondents perceive to be contained within the Petition. What is clear is that Respondents choose to deny the fundamental principle underlying a motion to dismiss – that the allegations of the Complaint are deemed to be true for purposes of a Rule 12(b)(6) motion. The allegations of the Complaint have been fully and correctly set forth in the Petition and the Complaint is attached (App. 74-108) for the Court's own review.

REASONS FOR GRANTING THE WRIT

I. THE STANDARDS GOVERNING THE REQUIREMENT THAT A REGULATION SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS IS AN IMPORTANT AND RECURRING QUESTION OF REGULATORY TAKINGS LAW THAT HAS NOT BEEN SETTLED BY THIS COURT

Paraphrasing Respondents' argument, the Constitutional requirement that land use regulations "substantially advance legitimate state interests," as pronounced in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) and repeatedly cited thereafter, is "ill-suited for inclusion on [this Court's] docket" and "granting the writ in this case would be senseless." (Opposition, 6-7).[1] Moreover, Respondents argue that even if this were an issue deserving the Court's attention a case recently decided by the Ninth Circuit would be a "far better vehicle" for resolving it than the instant case. (Opposition, 7 n.3). Respondents' argument indicates a fundamental misunderstanding of regulatory takings jurisprudence and illustrates a myopic demand for abdication to local land use regulation.

It is well established by this Court that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not *substantially advance*

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[1] The repeated use of belligerent expressions by opposing counsel exemplifies and mirrors the extraordinary hostility, animosity and retaliation effected by the County in singling out Petitioners for bad faith treatment.

legitimate state interests, or denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260 (citations omitted) (emphasis supplied). *See also, San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 647 (1981); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 704 (1999). The two-pronged *Agins* test is a cornerstone of regulatory takings law. This Court, however, "has [never] provided a thorough explanation of the nature and applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions. . . . " *Del Monte Dunes*, 526 U.S. at 704. It is clearly ripe and appropriate for review based on the hostile and retaliatory actions deemed true in the record below.

The Fourth Circuit has interpreted this Court's "substantially advance" standard as nothing more than a superficial requirement satisfied any time "statements by local lawmakers set out legitimate reasons for imposing height and density restrictions on property in a particular class of zones. . . . " (App. 14). Naturally, Respondents advocate this unmitigated deference to property regulations, but this Court has not upheld such a total abdication of review in the past and should not allow it to stand in this case. *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) ("The greatest weight is given to the judgment of the legislature, but it always is open to

interested parties to contend that the legislature has gone beyond its constitutional power."); *Nollan*, 483 U.S. at 841 ("We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination."); *Dolan*, 512 U.S. at 392 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation. . . . ").

Unmitigated deference to local property regulations would contradict this Court's takings jurisprudence which repeatedly finds that takings analysis is dependent upon the particular facts and circumstances of the case. *See, Pennsylvania Coal Co.*, 260 U.S. at 413; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) and *Del Monte Dunes*, 526 U.S. at 720 ("Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that 'there must be an exercise of eminent domain and compensation to sustain the act . . . depends upon the particular facts.' " (quoting *Pennsylvania Coal Co.*, 260 U.S. at 413)).[2]

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[2] *See also Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *San Diego Gas & Elec. Co.*, 450 U.S. at 649-50; *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 426 (1982); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 349 (1986); *Keystone Bituminous Coal Ass'n*, 480 U.S. at 474 and 495; *Hodel v. Irving*, 481 U.S. 704, 714 (1987); *Yee v. City of Escondido*, 503 U.S. at 522-23; *Lucas*, 505 U.S. at 1015; *Nollan*, 483 U.S. 825 (1987); *Dolan*, 512 U.S. 374 (1994).

"Pennsylvania Coal instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 487 n.16. By summarily accepting the proffered legitimate reasons for adopting a land use ordinance and presuming, because it contains elemental Euclidean height and density restriction (even where oppressive) that it "quite obviously . . . substantially advance[s] a legitimate state interest" (App. 12-13) the Fourth Circuit, without any supporting public policy rationale to support its deviation, contradicts this Court's established regulatory takings jurisprudence.

The record, fairly pleaded, establishes that Bill 111-98 was the product of conspiracy between the County and certain adjacent and nearby property owners (App. 89, ¶ 44), was inconsistent with the County's adopted Master Plan and was adopted solely out of personal animus and retaliatory intent. (App. 83, ¶ 25; App. 101, ¶ 72; App. 104, ¶ 78). Petitioners do not contest that there is a legitimate state interest in protecting Resource Conservation Zones as they may appear. Rather, Petitioners claim the Ordinance adopted in the name of preserving Resource Conservation Zones did not substantially advance that avowed purpose. The Ordinance failed to substantially advance the protection of Resource Conservation Zones by permitting, without exception, the construction of buildings in office or manufacturing zones, even if immediately adjacent to Resource Conservation Zones, far in excess of the height and Floor Area.

II. IN DISMISSING GREENSPRING'S EQUAL PROTECTION COUNTS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED THE FOURTH CIRCUIT IGNORED THIS COURT'S PRECEDENT IN *VILLAGE OF WILLOWBROOK V. OLECH*

Respondents' Opposition misconstrues Petitioners' argument. Simply stated, *Village of Willowbrook v. Olech* held that allegations of "irrational and wholly arbitrary" action by a local government made by a "class of one . . . are sufficient to state a claim for relief under traditional equal protection analysis." 528 U.S. 562, 563 (2000). Petitioner has alleged in the instant case that "Bill No. 111-98 randomly, irrationally, unreasonably and selectively applies height and area restrictions to BM, BL and BR zone properties, including Plaintiffs' Property, [and] does not apply to all similarly-situated properties which actually have the potential to adversely affect RC zone . . . . " (App. 97, ¶ 63). In addition, Petitioners alleged the "extra factor [of] . . . 'vindictive action', 'illegitimate animus', or 'ill will' " which is necessary to distinguish the case from "the simple and common instance" of a zoning action that lacks a rational basis for intentional disparate treatment of landowners. *Olech*, 528 U.S. at 563. (App. 91, ¶ 50). Clearly the grounds for stating an Equal Protection claim upon which relief may be granted, as set forth in *Olech*, were met by Petitioners.

Instead of evaluating whether Petitioners' allegations stated a sufficient claim under the Equal Protection clause, the Fourth Circuit made a conclusory determination on the merits of the case and on that basis adjudged the allegations insufficient. The Fourth Circuit made the

illogical and unfounded conclusion that "[b]ecause the local zoning decision at issue in the instant case is not 'irrational and wholly arbitrary,' Greenspring's complaint is easily distinguished from the complaint at issue in *Olech*." (App. 17 n.4). This analysis is patently inconsistent with the Court's decision in *Olech* which decided the sufficiency of allegations not whether the governmental action actually was irrational and arbitrary.

The Court should take this opportunity to define and clarify the ramifications of the *Olech* decision and overturn the Fourth Circuit's judgement as being in clear conflict with that decision.

III. GREENSPRING IS A CASUALTY OF THE CONFLICT AND CONFUSION AMONG THE CIRCUIT COURTS ABOUT HOW TO PROCEDURALLY ACHIEVE THIS COURT'S *WILLIAMSON COUNTY* REQUIREMENT THAT PROPERTY OWNERS "RIPEN" THEIR CONSTITUTIONAL CLAIMS BY SEEKING RELIEF IN STATE COURT BEFORE PURSUING AN ACTION IN FEDERAL COURT

Recognizing the confusion among the Circuits and the lack of definitive guidance or affirmation from this Court as to the legitimacy of any procedure for satisfying the ripeness requirements of *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), Petitioners (after exhausting all available administrative remedies) combined two precautionary steps in filing its court actions: (1) a state court action (seeking only Maryland constitutional and statutory remedies) reserving the federal claims pursuant to the instructions of the Fourth

Circuit in *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998) (praising the *Fields* and *Jennings* Reservation practice[3] and instructing *district courts* to advise takings litigants of their right to make such a reservation); and (2) a separate federal action in United States District Court (seeking only federal constitutional and legal remedies) reiterating the "Reservation" and simultaneously moving for a *stay* of "all proceedings . . . until the conclusion of the state court action" (App. 65) pursuant to the precedent of this Court in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1973).

Despite recognizing Petitioners' need to litigate in state court before subject matter jurisdiction is conferred upon the federal courts (Petition, pp. 26-27), and despite Petitioners' express Reservation and Motion to Stay (App. 62-71), the District Court erroneously heard Respondents' 12(b)(6) motion on the merits and dismissed all of Petitioners' claims with prejudice. The District Court did not have jurisdiction to hear and decide Petitioners' claims and had a duty to stay the entire action per Petitioners' request under this court's explicit *Williamson* instruction until the state court proceedings were complete.

Although *Williamson County's* ripeness requirements have been extended to Due Process and Equal Protection claims as well as Takings claims, the District Court dismissed all of Petitioners' claims despite a lack of subject matter jurisdiction. *See, e.g., Bennis v. Michigan Dept. of*

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[3] *Fields v. Sarasota – Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992) and *Jennings v. Caddo Parrish School Bd.*, 531 F.2d 1331 (5th Cir. 1976).

Nat. Res., 970 F.2d 154 (5th Cir. 1992); *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir. 1988), *cert. denied*, 488 U.S. 891 (1988); *Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th Cir. 1994); *Rocky Mountain Mat. & Asph., Inc. v. Board of County Comm'rs of El Paso County*, 972 F.2d 309 (10th Cir. 1972); *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987). Contrary to Respondent's contention, the Fourth Circuit held that Petitioners had satisfied the first element of *Williamson County's* two-pronged ripeness test, exhaustion of administrative remedies, but somehow, while praising Petitioners for using the *Fields'* reservation for as-applied takings claims, crushed Petitioners' right to proceed first in the state courts. (App. 11).

Petitioners' attempt to negotiate the procedural thicket created by *Williamson County's* ripeness requirement resulted in the premature hearing and dismissal of their claims. This Court's intervention is urgently needed to unravel the conflicting and apparently unmanageable conflict that *Williamson* has produced in the application of its principles.

CONCLUSION

Notwithstanding Respondent's Opposition, a Writ of *Certiorari* should be granted.

Respectfully submitted,

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